

**No. PD-0181-17**

**IN THE**  
**COURT OF CRIMINAL APPEALS OF TEXAS**

FILED  
COURT OF CRIMINAL APPEALS  
7/19/2017  
DEANA WILLIAMSON, CLERK

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**JUAN ANTONIO GONZALEZ,**  
**Appellant/Respondent**

**vs.**

**THE STATE OF TEXAS,**  
**Appellee/Petitioner**

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**APPELLANT/RESPONDENT'S REPLY BRIEF TO STATE'S BRIEF  
ON PETITION FOR DISCRETIONARY REVIEW**

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**FROM THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS  
CAUSE NUMBER 08-14-00293-CR**

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Submitted: July 19, 2017

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## **STATEMENT OF FACTS**

This case arises out of the actions of an off-duty cop, with a gun in his waistband, yelling homophobic slurs at three teenage boys walking down the street. Johnathan Molina, an off-duty El Paso Police Officer, followed these boys in his vehicle after he allegedly saw one of them scratching his car. He did not call for backup. He did not grab his badge. Once Molina caught up to the teens, he went after the smallest one, Tony, calling him names and getting in his face. When Juan Antonio Gonzalez (“Johnny”) stepped in to protect his friend, the conversation got heated, a physical altercation occurred, and Molina sustained injuries that caused his death. The bystanders, all of whom were traveling in moving vehicles and looking through their mirrors, characterized Johnny as the aggressor. None of the bystanders heard anything. The only witnesses that could both hear and see the entire incident testified that Johnny acted in self-defense. A summary of the evidence follows.

### *The Bystanders:*

Seventeen-year-old Johnny Gonzalez stepped between his friend Tony and a six-foot, 275-pound stranger, who was coming down the street calling them “faggots.” R. 4B:70. The man had first approached the smallest of the three kids, Tony, after following Johnny, Tony, and another friend, Alan, down the street in his

car. R. 5:127. After stepping between the stranger and Tony, Johnny and the man exchanged words. R. 3:240, 296; R. 4A:24, 28; 5:133. Bystanders could see that the exchange was not friendly but could not hear what any of the parties were saying. R. 3:52, 115, 121, 129-31.

One bystander, Mario Ramos, was watching out of his side mirror. R. 3:49-51, 79. He saw a teenager and a much heavier man standing face to face. R. 3:79-80. Through that side view mirror, Ramos claimed he saw Johnny punch the stranger, the two fall to the ground, and the teenager get up about ten seconds later. R. 3:52, 77, 96. Ramos admitted, however, that he lost sight of the two for 10-15 seconds, that his vision of the man was partially blocked, and that he was unable to see how the two landed when they fell. R. 3:88-89, 92, 93 96. He could not hear what was said nor could he see what either male did when they were on the ground. R. 3:52, 56, 76, 79, 125.

A second bystander, Erin Lile, was observing the altercation from the opposite direction than Ramos, where she could only see the man's back. R. 3:157-60, 186, 188. She did not hear anything either. R. 3:189. Lile, watching through her rearview mirror, claimed that the two men were standing apart, separated for a second, and then Johnny ran toward the stranger, knocking him off his feet. R. 3:160-61, 168-69, 171, 193, 203. She characterized this move as a "bum rush" and

saw the man's head hit the ground. R. 3:169. Lile also claimed that she saw the Johnny hit the stranger in the face with both fists, get up, and walk away with his friends. R. 3:172-73. She u-turned and went to the scene, where she observed a gun tucked in the man's waistband. R. 3:176-77.

Another bystander, Laura Mena, was traveling along the street and saw three teenagers standing close to a man. R. 3:131-32, 147. She did not see a confrontation – by the time she could turn her car around, whatever happened was already over. 3:131, 150. Mena approached the stranger on the ground and called 911. R. 3:134, 137-38; SX1-2. Mena heard someone say, “he has a gun!” R. 3:152.

*The Teenagers:*

Back in September 2012, Alan Medrano and Johnny had been friends for four years. R. 3:206-09. Much like teenage boys do, the two played and sparred together, sharing some maneuvers they learned at boxing and judo class. R. 3:209, 231, 233, 282. Specifically, Alan showed Johnny a few boxing moves and Johnny showed Alan how to take someone down defensively. R. 3:211, 230-32, 280. When he was younger, Johnny had learned that the judo take down move was to be used as leverage if you were threatened by someone larger than you. R. 3:232, 253. Johnny told Alan that the judo move was only for self-defense purposes. R. 3:281.

In total, Alan had taken boxing classes for less than six months, several years prior to the incident. R. 3:211, 231. Johnny had taken judo classes for only two or three months. R. 3:211, 230-32, 280.

On the day of the incident, the three boys were walking down Trowbridge at about 3:45 p.m., heading home. R. 3:209, 234-35. As they reached the end of the block, Johnny heard a strange man yelling at them, “you fucking faggots.” R. 5:124. None of the boys said anything to the man and kept walking. R. 5:125. The man came out of his house and then followed them in his car. R. 3:238-39.

The man pulled up beside the boys, exited his car, and approached Tony, saying “Why the fuck did you scratch my car.” R. 3:239-41; 5:127. Alan got scared once the man approached Tony. R. 4A:12-13. The man, who towered over Tony, got abusive, would not back down, and began spewing homophobic slurs, calling Tony a “fag,” a “faggot,” and a “bitch.” R. 3:241, 286, 329; R. 4A:19-20, 24-25.

It was at this point that Johnny stepped in and told the stranger to chill out. R. 3:240, 296; R. 4A:24, 28; 5:133. Johnny pushed Tony behind him to protect him. R. 5:1:33-134. Even though the man and Johnny were somewhat of the same height, the man was much heavier. R. 4:23; 5:137. Again, the strange man called Tony a “faggot.” R. 3:241. He also told Johnny and Alan to leave, but the two did



not feel they could leave since the man had followed them in his car once already – he could just follow them again and hurt them. R. 4:27; 5:137. Johnny kept trying to diffuse the situation by telling the man to back off, chill out, and stop but the man would not listen. R. 4:28.

At some point during the confrontation, the man claimed that he was an officer. R. 3:243, 298. Johnny asked to see his badge. R. 3:243, 298. In response, the man defiantly stated, “I don’t have to show you shit.” R. 3:243; 5:140. Alan and Johnny did not believe that the stranger was a police officer because he did not act like one – refusing to show his credentials and using words like “bitch” and “faggot” with teenagers. R. 3:284-85, 287; 5:135-136. All the boys would have followed an officer’s instructions had he shown them his badge. R. 4:61; 5:141.

After refusing to show his credentials, the argument between the man and Johnny continued and the two inched closer to one another. R. 3:245-46. As the conversation grew even more heated, Johnny tried telling the man that he could not hit him because he was only 17. R. 5:138. The man responded with, “I don’t care how old you are, I could kick your ass and the rest.” R. 5:138. Alan truly believed that the stranger could have hurt Johnny and that Johnny did not look like he wanted to fight. R. 4A:55-56, 58, 62.

Soon, the stranger got physical by driving his shoulder into Johnny’s chest.

R. 3:243, 245-46, 4:33. Johnny was scared. R. 5:143-144. In self-defense, Johnny reacted by punching the stranger, then used the defensive move to grab him by the legs and take him to the ground. R. 3:250, 252; R4A:33, 35-36. Johnny's defensive moves happened quickly, in one motion. R. 4:33, 36, 62. As Johnny grabbed the man, he felt the man's hands on his legs trying to push him down and to the side. 5:144. The man was using his legs to try and kick Johnny off. R. 5:144.

After the fall, Alan saw Johnny punch the stranger a few more times, and when the stranger stopped fighting back, Johnny got up and walked away. R. 3:254-55. Alan described the incident like a teenage boy would – that Johnny “got the better of the fight.” R. 3:256.<sup>1</sup> Alan believed that Johnny not only acted in self-defense but in defense of Tony. R. 4A:55-56, 58, 62. At the time of the confrontation, none of the teens notice that the man had a gun. R. 4:61. They got lucky. R. 4:62.

The events of this horrific accident will always be lodged in Johnny's

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<sup>1</sup> Although the State points to a “slew” of inconsistencies between Alan's in-court testimony and the police report, the series of events remains the same: (1) a stranger, in plain clothes, yells at the teenagers then follows them in an unmarked car; (2) the stranger aggressively confronts the smallest of the three boys; (3) Johnny gets involved in an attempt to deescalate the situation; (4) the stranger continues to be combative, even though he claims that he is a peace officer; (6) the stranger refuses to show anyone official identification; (7) the stranger starts the physical altercation by shoving Johnny; (8) Johnny and the stranger end up on the ground, Johnny throws some punches, and the teens walk away. *See* State's Brief, pp. 19-22.

memory. R. 5:159, 192-93.<sup>2</sup> He told the jury that he was just trying to defend himself and never intended to kill the man. R. 5:146. In the fights that Johnny had seen where one person was taken down to the floor, that person always got up. R. 5:149. Johnny was upset and scared after the fight. R. 5:145. When he got up and walked away after, it looked like the man was trying to get up and gather himself, to shake himself off. R. 5:146-147. He did not think that the man was seriously hurt. R. 5:147.

*The Injuries:*

When the paramedics arrived, the man was exhibiting signs of a brain injury. R. 4A:174-79. The man was still moving about in the ambulance and was so strong that he broke the c-collar, removed all the straps holding him down, and tried to get off the stretcher. R. 4:178. At the hospital, the man became unresponsive and underwent surgery to relieve pressure on his brain. R. 4A:179-80; 4B:39-40. He died ten days later from his injuries. R. 4B:39-41.

Chief Medical Examiner, Dr. Juan Contin, testified that a person of the man's size, without any intervening forces, could fall in such a way as to cause this type of injury by himself. R. 4B:42-43, 70. In fact, just the man's body weight could

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<sup>2</sup> Several other witnesses testified that Johnny was not a violent person. R. 5:56, 62 (Teacher Linda Tavizon); 5:64, 68 (Teacher Beverly Wiedner). He respected law enforcement and wanted to turn himself in to the police the next day. R. 5:71-72.

cause that level of damage to his skull if he stumbled backwards and fell. R. 4B:41. The type of trauma the man sustained could also have been caused by a push from another person or even a drunk person who lost his balance and fell. R. 4B:71.

At the scene of the incident, the cement was uneven and there were ample areas where one could trip. R. 5:90-91. The area had bumps and cracks and pieces of concrete missing. R. 4:44. The sidewalk at the scene of the incident was very uneven and that a person could easily stumble just walking or backing up in the area. R.4B:16-17.

Dr. Contin opined that after the fall, it was possible that the man could continue to fight, punch, and know what he was doing for a brief time. R. 4B:73-74. He confirmed that the man died from blunt force trauma to the head and the punches did not contribute in any way to man's death. R. 4B:76, 78.

*No indication that he was an officer:*

At the time he confronted the teenagers, Molina was dressed in a gray shirt and jeans. R. 3:87. None of the bystanders knew the man on the ground was Officer Jonathan Molina. R. 3:153-55, 176. First responders did not know either until a firefighter pulled Molina's wallet from his back pocket, revealing his police identification card. R. 5:8. Molina did not have a badge with him. R. 5:209. First responders confirmed that Molina was carrying his firearm. R. 5:9. The gun

had a bullet in the chamber. R. 5:214-215.

*The ecstasy:*

Earlier in the day, Johnny sent his girlfriend a series of Facebook messages that referenced ecstasy use. R. 5:195-199. The first message that referenced “rolling” was sent at 10:32 a.m., when Johnny began feeling the effects of the ecstasy pill. R. 5:171. The last message was sent at 10:58 a.m. R. 5:171. The State introduced eleven such messages. R. 5:171. After the ecstasy wore off, Johnny did not take any more pills. R. 5:199-200. He was no longer under the influence of the pill almost 5 hours later, when the incident occurred. R. 5:199.

## **SUMMARY OF THE ARGUMENT**

### **REPLY TO GROUND FOR REVIEW ONE:**

The Eighth Court correctly held that evidence of ecstasy consumption by Gonzalez on the day of the fist fight was irrelevant because there was no evidence that Gonzalez was under the influence of ecstasy, or any other drug, at the time of fight. Without some way to connect the ecstasy use to Gonzalez being under the influence of ecstasy at the time of the fight, the evidence was not relevant and the probative value could not have outweighed the danger of unfair prejudice. Contrary to the State's claims, the Eighth Court did not require evidence of the drug's half-life or the length of its effects, before such evidence could be introduced. The Eighth Court simply pointed out that the State had failed to present any evidence that would allow the jury to determine that because Gonzalez had used ecstasy earlier in the day, he would still be operating under the effects of the ecstasy.

### **REPLY TO GROUND FOR REVIEW TWO:**

The Eighth Court correctly held that evidence of ecstasy use and possession by Gonzalez on the day of the fight was irrelevant, unduly prejudicial, and affected Gonzalez's substantial rights. The Eighth Court properly set out the correct standard of review and correctly applied that standard to the facts of the case.

## ARGUMENT – REPLY TO GROUND FOR REVIEW ONE

**REPLY:** The Eighth Court correctly held that evidence of ecstasy consumption by Gonzalez on the day of the fist fight was irrelevant because there was no evidence that Gonzalez was under the influence of ecstasy, or any other drug, at the time of fight. Without some way to connect the ecstasy use to Gonzalez being under the influence of ecstasy at the time of the fight, the evidence was not relevant and the probative value could not have outweighed the danger of unfair prejudice. Contrary to the State's claims, the Eighth Court did not require evidence of the drug's half-life or the length of its effects, before such evidence could be introduced. The Eighth Court simply pointed out that the State had failed to present any evidence that would allow the jury to determine that because Gonzalez had used ecstasy earlier in the day, he would still be operating under the effects of the ecstasy.

The State's argued in its petition for discretionary review that the Eighth Court's decision conflicts with *Manning v. State*, 114 S.W. 3d 922 (Tex. Crim. App. 2003) and *Montgomery v. State*, 810 S.W. 2d 372 (Tex. Crim. App. 1990). The State is incorrect.

In *Manning*, the defendant was charged with manslaughter. It was alleged in the indictment that one of the ways in which Manning was reckless was because he "consumed a controlled substance." *Manning* at 114 S.W. 3d 923. Manning did not attempt to quash this portion of the indictment.

The majority opinion did not address the issue of relevance. It simply held that the appellate court erred because it conducted its 403 analysis under the mistaken belief that evidence of cocaine use was an improper extraneous. *Id.* at 927-928. However, because the allegation of cocaine use was contained in the

indictment, the State at a minimum, had to prove cocaine use, irrespective of whether it could prove intoxication. *Id.* Consequently, the lower court's harm analysis was tainted by this faulty presumption. *Id.* The statement by the Court that the lower court was confusing sufficiency with admissibility only applies to the fact pattern presented in Manning, where the allegation of drug use is part of the indictment.

Contrary to the State's assertion in its petition, the concurring opinion pointed out that evidence of cocaine use was not relevant if it could not be shown that the appellant was under the influence at the time of the collision. *Id.* at 929.

For the evidence to be more probative than prejudicial, the evidence must first be relevant to some fact of consequence in the trial. For the presence of the cocaine metabolite to be relevant, it must be shown that the appellant was under the influence at the time of the collision. Otherwise it is like showing that the appellant had consumed cocaine the day before the collision to prove that he was under the influence when the collision occurred. That evidence would not be admissible in this case to prove the fact of consequence that the appellant was under the influence of cocaine at the time of the collision. Without some way to connect the metabolite to the appellant's being under the influence at the time of the collision, the evidence was not relevant, and thus, the probative value could not have outweighed the danger of unfair prejudice, which even the trial court acknowledged was a problem. *Id.* at 929.

The concurrence did not believe this evidence required reversal because there was overwhelming evidence by other means charged in the indictment that Manning operated his vehicle recklessly. *Id.* at 929.



**I. The Eighth Court properly held that evidence of Gonzalez’s ecstasy possession and use on the day of the incident was irrelevant.**

**A. Standard of Review for Evidentiary Rulings**

A trial court's ruling on the admissibility of evidence is reviewed under an abuse-of-discretion standard. *Moses v. State*, 105 S.W.3d 622, 627 (Tex.Crim.App.2003). A trial court abuses its discretion when its decision is so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex.Crim.App.2005).

A trial court's ruling on the admissibility of an extraneous offense evidence is generally within this zone of reasonable disagreement if it (1) is relevant to a material, non-character conformity issue, and (2) the probative value of that evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury. *De La Paz v. State*, 279 S.W.3d 336, 344 (Tex.Crim.App. 2009).

*Gonzalez v. State*, No. 08-14-00293-CR, 2017 WL 360690, at \*8 (Tex. App. Jan. 25, 2017), petition for discretionary review granted (May 17, 2017).

**B. The relevance standard**

Under Rule 401, evidence is relevant if it makes the existence of a fact that is of consequence to the determination of the action more probable than it would be without the evidence. Although the threshold burden of relevancy is low, drug evidence generally has no relevance in a non-drug prosecution. *See Couret v. State*, 792 S.W.2d 106, 108 (Tex. Crim. App. 1990). Our system of justice recognizes

that a defendant should be tried only for the charged crime and not for his criminal propensities. *See Robles v. State*, 85 S.W.3d 211, 213 (Tex.Crim.App.2002). Furthermore, extraneous offenses or bad acts are inherently prejudicial. *See Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983); *Cude v. State*, 588 S.W.2d 895 (Tex. Crim. App. 1979).

The State attempts to portray the Eighth Court's opinion as requiring it to produce evidence of ecstasy's half-life and the length and type of its effects before presenting the jury with evidence of a defendant's intoxication by ecstasy. State's Brief at 33-34. However, this is not what the Eighth Court said or did. The Eighth Court acknowledged that if there was evidence of intoxication, whatever that evidence might be, it might be relevant to Gonzalez's claim of self-defense. *Gonzalez* at \*9.<sup>3</sup> The half-life of ecstasy and the duration and type of effects caused by ecstasy are simply pieces of evidence that might have made the ecstasy use relevant. "It may be on re-trial that the State can show that use of ecstasy six hours before the alleged crime affected Appellant's mood, perception, memory, or reactions." *Gonzalez* at \*11. However, since there was no evidence to show that Gonzalez was "under the effects of ecstasy at the time of the incident, or really any

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<sup>3</sup> As pointed out above, *Manning* contains explicit language stating that evidence of drug use is not relevant if the State is unable to prove intoxication at the time of the offense. *Manning* 114 S.W. 3d at 929. This is exactly what the Eighth Court held.

indication of what those effects may have been. . .” the ecstasy was not relevant to any material, non-character conformity issue. *Id* at \*10; *See also De La Paz*, 279 S.W. 3d at 344.<sup>4</sup>

In foot note 23, the State again ignores *Manning*, stating that it is aware of no authority requiring proof of intoxication at the time of the offense. State’s Brief at p. 33 fn. 23. It then cites several unpublished, intermediate court cases in support of its proposition that it may present evidence of drug use without proving intoxication at the time of the alleged offense. Contrary to the State’s claim, the cases it cites are not inconsistent with the Eighth Court’s holding or, this Court’s holding in *Manning*, requiring proof of intoxication at the time of the incident in question. In *Hosmer*, defendant admitted that he was intoxicated at the time of the offense. *Hosmer v. State*, No. C14–89–01050–CR, 1990 WL 183472, at \*3 (Tex.App.–Houston [14th Dist.], Nov. 29, 1990, pet. ref’d)(not designated for publication). In *Newman*, there was evidence that the defendant had consumed alcohol and marijuana two hour prior

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<sup>4</sup> At oral argument, the justices were concerned that no one really knew how ecstasy would affect a person’s mental state. Justice Rodriguez commented that while she had knowledge of how alcohol and marijuana affect a person’s mental state, she had no idea how ecstasy would affect a person’s mental state. Even at oral argument, the State was unable to fill in the blanks as to the effects of ecstasy use. Consequently, with the evidence presented by the State, the jury was not given the tools by which it could give any legally valid weight to ecstasy use. On the other hand, the jury could incorrectly speculate or simply guess, how ecstasy use, more than 6 hours prior to the fight, might affect Gonzalez’s mental state. The Eighth Court was properly concerned with the inherent unfairness and obvious injustice of allowing an individual to be convicted under such circumstances.

to the murder and was a little drunk at the time of the offense. *Newman v. State*, No. 11–01–00066–CR, 2001 WL 34375770, at \*1–2 (Tex.App.–Eastland, Nov. 15, 2001, no pet.)(not designated for publication). And, in *Adams*, the issue of intoxication at the time of the offense was not the contested issue on appeal as no objections were made to drug use on the day of the offense. *Adams v. State*, No. 13–01–340–CR, 2002 WL 31412530, at \*2 (Tex.App.–Corpus Christi, Oct. 24, 2002, pet. ref'd)(not designated for publication).

**C. Ecstasy evidence was not relevant to any fact of consequence.**

The State sidesteps the issue of intoxication by assuming because Gonzalez used ecstasy on the day of the incident, it was reasonable to assume that he was under the influence of the drug at the time of the incident. However, the State never provides any evidence that supports such a leap. The Eighth Court points this deficiency out by stating “there was no evidence of the actual effects of the drug on the mind, either during use, or after the user has come down. Gonzalez at \*9. It further points out that there might be certain intoxicants from which a jury's common experience might fill in some of these gaps, or there may be time periods of such short duration that an inference of continued intoxication might be justified, [but] this case presents neither. *Gonzalez* at 10.

Finally, all of the State’s arguments focus on the propriety of admitting

evidence of Gonzalez' ecstasy use on the day in question. It never addresses what relevance Gonzalez' possession of ecstasy pills would have other than to show that Gonzalez was a bad person for using and possessing drugs.

**II. The Eighth Court properly held that the probative value, if any of Gonzalez' ecstasy possession and use on the day of the fight was substantially outweighed by the danger of unfair prejudice.**

**A. Standard of review**

A trial court's ruling on the admissibility of evidence is reviewed under an abuse-of-discretion standard. *Moses v. State*, 105 S.W.3d 622, 627 (Tex. Crim. App. 2003). A trial court abuses its discretion when its decision is so clearly wrong as to lie outside the zone within which reasonable persons might disagree. *McDonald v. State*, 179 S.W.3d 571, 576 (Tex. Crim. App. 2005).

**B. Unfair prejudice**

Rule 403 states "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence." Tex. R. Evid. 403. In conducting a Rule 403 balancing test, the trial court must consider (1) the inherent probative value of the evidence and (2) the State's need for that evidence against (3) any tendency of

the evidence to suggest a decision on an improper basis, such as emotion, (4) any tendency to confuse or distract the jury from the main issues, (5) any tendency to be given undue weight by a jury that has not been equipped to evaluate the probative force of the evidence, and (6) the likelihood that presentation of the evidence will consume an inordinate amount of time or be needlessly cumulative. *Gigliobianco v. State*, 210 S.W.3d 637, 641–42 (Tex. Crim. App. 2006).

**C. Probative value of ecstasy use and possession was substantially outweighed by the danger of unfair prejudice.**

The Eighth Court held:

Without any indication that Appellant was still under the effects of ecstasy at the time of the incident, or really any indication of what those effects may have been, the evidence fails the basic relevance test. But even if there were some slight relevance, it would be substantially outweighed by the danger of unfair prejudice under TEX.R.EVID. 403. As presented, the ecstasy evidence had no, or at least very little probative value in rebutting Appellant's claim of self-defense, and thus the State had little need for this evidence. As such, the evidence did not go to a central issue in the case, but it does raise concerns for swaying a jury on an improper basis, distracting the jury, or permitting the jury to place undue weight on the evidence which it was ill-equipped to evaluate. Just apart from the use of drugs, Appellant was taking a drug while at school. The evidence suggested that Appellant was also in possession of other pills that he intended to use with his girlfriend. These aspects add additional layers of prejudice. We conclude that admission of the evidence in guilt innocence runs afoul of Rule 401, 403 and 404(b). *Gonzalez* at \*10

Contrary to the State's contention regarding the Eighth Court's 403 analysis,

the Eighth Court succinctly and completely addressed all the 403 balancing factors.<sup>5</sup> The evidence had very little probative value, if any. As presented, the State did not need the evidence because it did not help prove or give greater weight to any fact of consequence. Had the State presented evidence of intoxication at the time of the offense, both factors may have been weighted differently. Factors 3, 4, and 5 also weighed against the State's position because Gonzalez' ecstasy use while in school coupled with his possession of additional pills of ecstasy, raised concerns that the jury might be swayed improperly by character conformity evidence, it distracted the jury from the relevant issues, and it allowed the jury to place undue weight on evidence which it was not equipped to evaluate.

The State repeatedly makes the conclusory statement that ecstasy use was relevant to Gonzalez' state of mind but it never explains how the ecstasy use impacted Gonzalez' state of mind. At trial, the State admitted that it could not bring in ecstasy use from the previous day and if it did so, the only purpose of doing so would be to simply show that Appellant uses drugs. R. 5:173. But then the State insisted that drug use in the morning was relevant simply because it was the same

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<sup>5</sup> The State in its brief references the 6 factors listed in *Gigliobianco* but then evaluates the issue under the four factor test previously used before *Gigliobianco*. See State's Brief pp. 37-40. While the *Gigliobianco* test is simply a more refined version of the original four factor test, it is the test that is currently applied in conducting a proper 403 analysis. *Gigliobianco* 210 S.W. 3d at fn 8.

day without providing any explanation why the morning of would be relevant while the night before would not be. R. 5:173. The State is unable to explain the relevance of ecstasy use because, since there was no evidence of intoxication at the time of the fight, it is impossible to articulate how ecstasy use could have affected Gonzalez' state of mind. As such, the State's evaluation of the first factor is erroneous.

The State characterizes evidence of ecstasy use while at school as having little potential to impress the jury in an improper way. State's Brief at p. 38. According to the State, a jury would hardly be moved by evidence that a 17-year old kid was taking drugs and tripping while at school. This statement is ludicrous. And, as it did in its relevance evaluation, it fails to address the evidence that Gonzalez possessed additional ecstasy pills which he planned to use with his young girlfriend. Its evaluation of the second factor is also erroneous as it attempts to minimize the impact evidence of drug use at school, by a defendant, would have on a jury.

As to the third factor, the State argues that because the State took very little time in presenting the evidence, this factor weighed in favor of admission. It cites *Erazo v. State* for the proposition that because the complained of evidence took very little time to develop, this factor weighed in favor of admissibility. 144 S.W. 3d 487, 495 (Tex. Crim. App. 2004). Interestingly, in *Erazo*, even though the Court found this factor favored admissibility, it still found that the evidence should have been



excluded because much like this case, the evidence did not prove any issue in dispute. *Id.*

Finally, on the fourth factor, the State again claims admission is favored because the ecstasy use was relevant to the self-defense issue. As it does throughout its brief, the State makes this blanket assertion without articulating the effect using ecstasy had on Gonzalez' state of mind. The State fails to do so because it doesn't know.

The Eighth Court properly evaluated the 403 factors contained in Gigliobianco and its decision sustaining Gonzalez' issues 13 and 14 should be affirmed.

## **ARGUMENT – REPLY TO GROUND FOR REVIEW TWO**

**REPLY:** The Eighth Court correctly held that evidence of ecstasy use and possession by Gonzalez, on the day of the fight was irrelevant, unduly prejudicial and affected Gonzalez’ substantial rights. The Eighth Court properly set out the correct standard of review and correctly applied that standard to the facts of the case.

### **I. II. Standard of review and appropriate harm standard**

The State agrees, as does Respondent, that the Eighth Court properly set out the standard of review and the factors to consider in determining whether reversal is appropriate. The State takes issue with the Eighth Court’s harm analysis and the weight given to different factors. Respondent takes issue with the State’s less than complete recitation of relevant facts and its refusal to acknowledge that evidence of drug use and possession, while at school, by a defendant, is highly inflammatory and emotionally charged evidence. Respondent further takes issue with the State’s mischaracterization of the Eighth Court’s holdings. Contrary to the State’s arguments, the Eighth Court never held or intimated that “placing in a poor light” is enough to require reversal. The Eighth Court set out several reasons evidence of drug use and possession was harmful, one of those being that it placed Gonzalez in a poor light. This however, was not the only reason, the Eighth Court believed the admission of irrelevant, prejudicial evidence of drug use required reversal.

The following is the Eighth Court's harm analysis:

We conclude the admission of the drug use (and possession evidence) affected Appellant's substantial rights. The character of the evidence is, and should be, disturbing to an average juror. That Appellant used an illicit drug while in school, communicated about it to his girlfriend, and planned to later use the drug with his girlfriend would place Appellant in a very poor light. We disagree with the State's assertion that this evidence was not "inflammatory nor emotionally charged." The parties dispute the State's emphasis on this evidence. The drug related questions comprise four pages of some twenty-nine pages of cross-examination. The State did not mention the drug use in closing argument, but several times referred the jury to other specific Facebook messages. The jury asked for all the exhibits to review, which would have included these messages.

The most important factor here is the nature of the evidence supporting the verdict and the other evidence of guilt. The details of what happened that day came in through several passersby who had a sometimes limited visual perception of the events, and who heard none of the conversation between Appellant and Officer Molina. Otherwise, the evidence came in through Alan Medrano, whose trial testimony was largely consistently with Appellant's, but whose earlier statements painted a somewhat different view. That left the jury with Appellant's testimony. His case rose or fell on his credibility. Suggesting that he was high on drugs would certainly influence his credibility. This is not a situation such as *Smith v. State*, 08-05-00018-CR, 2006 WL 1710381, at \*7 (Tex.App.-El Paso June 22, 2006, pet ref'd)(not designated for publication) where we found evidence of extraneous drug use harmless. In *Smith* two separate eyewitnesses supported the jury's finding of guilt on the centrally contested issue of fact. Here, the only eyewitnesses to the entire event were Appellant and Medrano, and if they were believed, a jury could have well returned a different verdict. Medrano's credibility was hampered to some degree by inconsistencies from his prior statement. Placing the imprimatur of drugs and drug use on Appellant's testimony could well have changed the jury's calculus.

We overruled Appellant's legal sufficiency challenge on self-defense not because the evidence of guilt was overwhelming, but largely because the evidence conflicts, and we must honor the jury's choice of which evidence to believe. But painting Appellant as high on drugs that day goes directly to the matter of who the jury was to believe. It may be on re-trial that the State can show that use of ecstasy six hours before the alleged crime affected Appellant's mood, perception, memory, or reactions. The State did not do so. We sustain Issues Thirteen and Fourteen. *Gonzalez* at \*11.

### **III. The admission of ecstasy use and possession did warrant reversal**

The State argues that ecstasy evidence would “affect the credibility” of Gonzalez version of events and that is why it was relevant to his self-defense claim. In the alternative, it argues that if the evidence was not relevant because the State could not show intoxication at the time of the offense, then it could not have harmed Gonzalez’ defense. These statements are logically flawed and completely miss the point of a harm analysis. The fact that ecstasy use and possession was not relevant to prove any legally necessary and admissible fact of consequence does not mean that it would have no effect on the jury. It simply means that it would not have any proper effect on a jury. Contrary to the State’s argument, a drug using witness is likely to be less believed than a non-drug using witness. This is precisely why evidence of drug use is generally inadmissible in non-drug cases. *See Couret v. State*, 792 S.W.2d at 108.

**A. The ecstasy evidence was inflammatory and emotionally charged**

Gonzalez' use of ecstasy occurred while he was at school. Gonzalez was 17 at the time and attending a credit recovery high school. The issue of drugs in school is highly inflammatory and as the Eighth Court points out, disturbing. The Texas legislature thinks possession of drugs at school is serious and it penalizes defendants that are near schools when they possess drugs. The State's characterization of Gonzalez "trippin" and "rollin" at school as being relatively innocuous is intellectually dishonest. The Eighth Court got it right when it described the evidence as disturbing, inflammatory and highly emotional.

**B. The State did emphasize the ecstasy use.**

The evidence of ecstasy use was presented through Facebook exhibits that contained messages Gonzalez had shared with his friends. Gonzalez was asked about these messages when he testified. The manner in which the State was able to present these messages in print, through Gonzalez himself, made their impact that much more forceful. The State's reference to the Facebook messages during closing, necessarily pointed the jury in the direction of the messages regarding drug usage. Contrary to the State's assertion in footnote 25, the record does reflect that the jury requested to view the evidence in the case. Tr. at 420.

### **C. Evidence supporting the verdict**

The State's portrayal of the fight that led to Molina's death is misleading. It points to a Facebook conversation where Gonzalez states he killed a guy but then later states he did not because he saw it in the news as evidence that he did not act in self-defense. However, it fails to mention the message from Gonzalez to his girlfriend where he explains "Okay so me and two friends walked home and this started talking shit to us, and at first I told him to back off and he pushed me so I punched him, then tackled him, then punched him again when I got up the guy started twitching and bleeding so we ran and the cops almost got me, but I ran and I barely got home safely...." Tr. at 292.

According to the witnesses, the fight took no more than ten seconds from start to finish. One witness said the fight had not started when she first drove by and it was over by the time she drove a few houses down and made a U-turn. This was not the brutal attack portrayed by the State in its statement of facts. It was a fight between two grown men that unfortunately, by sheer bad luck, resulted in the death of one individual. Any attempt to paint this as anything else, is misleading. According to Dr. Contin, Molina's cause of death was from hitting his head on the concrete not from any punches thrown by Gonzalez.

The Eighth Court focused on the less than overwhelming evidence of guilt in

making its determination that the improper admission of ecstasy use and possession required reversal. As with most cases where a defendant testifies, the Eighth Court correctly pointed out that Gonzalez' defense rose or fell based on his credibility. Suggesting that he used and possessed drugs while in school would most assuredly affect his credibility and the ultimate outcome of his trial.

Of the four harm factors, the only one not squarely on Gonzalez's side is whether the State emphasized the error. The other three factors clearly favor Gonzalez and as such, the Eighth Court did not error when it found that the improper admission of irrelevant, highly prejudicial evidence required reversal.

### **PRAYER**

Appellant prays that this Court deny the State's requested relief and affirm the Eighth Court's resolution of Issues 13 and 14.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that on July 19, 2017, a copy of Appellant/Respondent's Reply Brief was sent by email, through an electronic-filing-service provider, to petitioner's attorney: Raquel Lopez, raqlopez@epcounty.com.

I further certify that on July 19, 2017, a copy of Appellant/Respondent's Reply Brief was sent by email, through an electronic-filing-service provider, to the State Prosecuting Attorney, information@SPA.texas.gov.

/s/ Ruben P. Morales  
Ruben P. Morales

### **CERTIFICATE OF COMPLIANCE**

I certify that this document contains 6,319 words, as indicated by the word-count function of the computer program used to prepare it, and complies with the applicable Texas Rules of Appellate Procedure.

/s/ Ruben P. Morales  
Ruben P. Morales